No. 78-1789

IN THE

Supreme Court of the United States

October Term, 1980

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN AND NATIONAL AMERICAN BANK, NEW ORLEANS, CO-TESTAMENTARY EXECUTORS OF THE SUCCESSION OF SEYMOUR WEISS, *Respondents.*

RESPONDENTS' BRIEF ON THE MERITS

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RESPONDENTS' BRIEF ON THE MERITS

QUESTIONS PRESENTED

1.

When a pipeline company, such as Arkansas Louisiana Gas Company ("Arkla") in this case, wrongfully injures and damages individual citizens with whom it has contracted by uncooperatively breaching and violating its private gas sales contracts, who must ultimately bear the legal and financial responsibility for the breach of contract and the actual losses and damages, the pipeline company and its private stockholders which violated the contract and caused the losses and damages *or* the innocent and injured citizens who through no fault of their own sustained and incurred the losses and damages?

2.

Whether under our American System of Justice Arkla, as respondents' uncooperative and defaulting contractual obligor in this private breach of contract case, is legally "*estopped*" from relying upon and unjustly taking advantage of its *own* continued breach of contract for 14 years, its *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract from respondents from 1961 to 1975 and the resulting "*Catch-22*"[1] nonperformance of the notice filing requirement of section 4 (d) of the Natural Gas Act as occasioned thereby with respect to

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[1]See: Joseph Heller, *Catch-22* (Simon & Schuster, 1955), at pp. 45 & 46:

> " 'Sure there's a catch,' Doc Daneeka replied. 'Catch-22. Anyone who wants to get out of combat duty isn't really crazy.' There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy

respondents' "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas (which "*contractually authorized*" prices were well below the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*") from September 1961 to September 1972 in order to unilaterally escape and evade its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant private corporate assets and profits for all of the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur from September 1961 to September 1972 with respect to their dry and residue gas due to its continued breach of contract since September 1961 and its uncooperative and effective withholding of all of the true facts concerning its continued breach of contract from respondents from September 1961 to December 1975?

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to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to: but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.
'That's some catch, that Catch-22,' he observed.
'It's the best there is,' Doc Daneeka agreed."

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RESPONDENTS' BRIEF ON THE MERITS

I.

INTRODUCTION

The voluminous record in this case and especially Arkla's own "*Internal Memorandums*" (Exs. P-58, J.A. 139; P-62, J.A. 140; P-77, J.A. 143; P-80, J.A. 144; P-82, J.A. 146; P-176, J.A. 152; P-177, J.A. 153; and P-192, J.A. 155) graphically

depict what has unfortunately happened to fifteen individual citizens of this Nation, Frank J. Hall, et al, who in 1952 in good faith contracted with and relied upon Arkla, a pipeline company-conglomerate, and then were subsequently forced by Arkla to spend almost 7 years of their lives engaged in expensive, burdensome and protracted litigation in order to simply discover the true facts concerning Arkla's continued breach of contract for 14 years and to protect themselves against the losses and damages they wrongfully sustained and incurred for 14 years because the conglomerate-obligor at its *own* unilateral whim and caprice elected *not* to timely honor and cooperatively fulfill its contractual commitments and obligations for 14 years.

After more than six years of expensive, burdensome and protracted breach of contract litigation conducted before a Louisiana state district court,[2] the United States District Court for the Western District of Louisiana,[3] the Federal Power Commission (F.P.C.),[4] a Louisiana state court of appeal,[5] the Loui-

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[2]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, Docket No. 225,699, First Judicial District Court, Caddo Parish, Louisiana, "Judgments" rendered on July 30, 1975, October 14, 1977, December 2, 1977, December 5, 1977, and May 17, 1979, respectively, J.A. 5, 7, 22, 27 & 69.

[3]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, Docket No. CA 75-1168 (Dist.Ct.W.D. La. 1976), "Judgment of Remand" rendered on February 2, 1976 pursuant to 28 U.S.C. 1447 (c) and (d), J.A. 160, 173 & 175.

[4]*Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI-76-28, Federal Power Commission "Orders" issued on March 8, 1976, November 8, 1976 and January 7, 1977, respectively, J.A. 177, 183 & 188.

[5]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 359 So.2d 255 (La.App.2d 1978), and 379 So.2d 1142 (La.App.2d 1980), J.A. 29 & 72.

siana supreme court,[6] the Federal Energy Regulatory Commission (F.E.R.C.)[7] and this Court in Docket No. 78-986, it has now been definitively established and confirmed that Arkla, as respondents' private contractual obligor under the 1952 *"favored nations"* contract, wrongfully injured and damaged the fifteen individual respondents herein from September 1961 through December 1975 in the same wrongful manner that the Kerr-McGee Corporation, Cities Service Gas Company, the Gulf Oil Corporation, and the Louisiana-Nevada Transit Company, as uncooperative and defaulting pipeline companies, also wrongfully injured and damaged other individual and corporate citizens of this Nation by uncooperatively breaching and violating similar private gas sales contracts. See: *Eastern Petroleum Co., et al v. Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp. v. American-Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); and *Louisiana-Nevada Transit Co. v. Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

By consistently applying basic principles of contract law and fundamental justice to the *evidence* in the above cited cases, the courts in the above cited cases properly and justly required the Kerr-McGee Corporation, Cities Service Gas Company, the Gulf Oil Corporation and the Louisiana-Nevada Transit Company, as uncooperative and defaulting pipeline companies that had breached and violated similar private gas sales

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[6] *Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 362 So.2d 1120 (La.S.Ct. 1978); 368 So.2d 984 (La.S.Ct. 1979); and Docket No. 67,225, Supreme Court of Louisiana, application for certiorari denied on May 2, 1980, J.A. 49, 50, 51 & 86.

[7] *Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Energy Regulatory Commission, "Orders" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively. See: Appendices A, B & C of this brief.

contracts, to independently respond in compensatory damages out of their *own* abundant private corporate assets and profits for the losses and damages which they wrongfully caused other citizens of this Nation to sustain and incur. By consistently applying these *same* basic principles of contract law and fundamental justice to the *evidence* presented in this case (including the F.P.C.'s clarifying "*Order*" dated November 8, 1976, Ex. D-59, J.A. 183), the Louisiana supreme court below properly and justly required Arkla, as the uncooperative and defaulting pipeline company that breached and violated its 1952 "*favored nations*" contract with respondents from 1961 to 1975, to independently respond in compensatory damages out of its *own* abundant private corporate assets (now over $1,000,000,000) and profits (now over $120,000,000 each year) for all of the losses and damages (approximately $2,700,000) that Arkla wrongfully caused respondents to sustain and incur from September 1961 through December 1975 with respect to their condensate, extractable liquid hydrocarbons, plant products *and* their dry and residue gas.

Arkla, in this proceeding (Docket No. 78-1789), has requested that this Court reduce the quantum of compensatory damages awarded to respondents by the Louisiana supreme court below from approximately $2,700,000 to $1,700,000. Arkla has based its claim for relief upon the unconscionable "*Catch-22*" contention that *because* Arkla, as respondents' private contractual obligor under the 1952 "*favored nations*" contract, rendered it absolutely *impossible* for respondents to timely prepare and file routine section 4 (d) notices setting forth their "*contractual entitlement*" to 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas (which "*contractually authorized*" prices as paid by Arkla to the United States government for the government's dry and residue gas from 1961 to 1972 were well *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*") with the F.P.C. from September 1961 to September 1972 by virtue of its *own* continued breach of contract for 14 years *and* its *own* uncooperative and effective withholding of

all of the true facts concerning its continued breach of contract from respondents from September 1961 to December 1975 Arkla is completely exempted and shielded from its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant private corporate assets (now over $1,000,000,000) and profits (now over $120,000,000 each year) for the actual losses and damages (approximately $1,000,000) that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 due to its continued breach of contract for 14 years and its uncooperative and effective withholding of all of the true facts concerning is continued breach of contract from respondents from September 1961 to December 1975.

The ultimate question to be resolved by this Court in this proceeding involves a basic principle of fundamental justice: who, Arkla and its private stockholders *or* respondents, must bear the legal and financial responsibility for the actual losses and damages (approximately $1,000,000) that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 due to Arkla's continued breach of contract from September 1961 through December 1975 *and* Arkla's own uncooperative and effective withholding of all of the true facts concerning its continued breach of contract from respondents from 1961 to 1975?

Respondents respectfully submit and will herein demonstrate that basic principles of fundamental American justice as heretofore consistently recognized, confirmed, applied and enforced by this Court *and* all other courts of this Nation for two centuries will *not* permit Arkla, the uncooperative and defaulting wrongdoer in this private breach of contract case, to commit an obvious injustice upon fifteen individual citizens for 14 years with full and complete impunity and immunity from Arkla's *own* separate and independent corporate obligation to respond in compensatory damages out

of Arkla's *own* abundant private corporate assets (now over \$1,000,000,000) and profits (now over \$120,000,000 each year) for all of the actual losses and damages (approximately \$1,000,000) that Arkla wrongfully inflicted upon the fifteen individual respondents herein with respect to their dry and residue gas from September 1961 through September 1972.

Moreover, respondents respectfully submit and will herein demonstrate that the definitive "*Orders*" as heretofore rendered by the F.P.C.,[8] the Louisiana supreme court[9] and the F.E.R.C.[10] in connection with this private breach of contract case correctly recognized and consistently confirmed that Arkla's independent payment of compensatory damages out of its *own* abundant private corporate assets and profits for the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 will *not* in any way adversely affect the substantive regulatory purpose of the notice provision of section 4 (d) of the Natural Gas Act which is to protect "*the relevant public interest*" against "*excessive prices*" (prices that *exceed* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*") for dry and residue gas sold in interstate commerce. The procedural notice provision of section 4 (d) was *never* designed or intended by Congress to be used by uncooperative and defaulting pipeline companies as a "*Catch-22*" tool for unilaterally destroying the "*integrity*" and "*stability*" of legitimate private contractual rights with complete corporate impunity and immunity from all losses and damages caused as a result thereof.

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[8]See: F.P.C. clarifying "*Order*" dated November 8, 1978, Ex. D-59, J.A. 183.

[9]See: *Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 368 So.2d 984 (La.S.Ct. 1979), J.A. 51.

[10]See: F.E.R.C. "*Orders*" dated April 25, 1979, May 18, 1979 and July 16, 1979, respectively, which are attached to this brief as Appendices A, B & C.

As respondents will further demonstrate in connection with this private breach of contract case, the F.P.C.[11] and the F.E.R.C.[12] have heretofore at respondents' request confirmed the Commission's applicable "*maximum, lawful, just and reasonable area rate ceilings*" for respondents' "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas for the 1961 to 1972 period *and* have heretofore thoroughly performed their section 4 (d) "*review function*" with respect to respondents' "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from September 1961 to September 1972 in order to confirm that respondents' "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf were *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*" and, hence, confirm that respondents' independent recovery of compensatory damages out of Arkla's *own* abundant private corporate assets and profits for their actual losses in this case does *not* in any way violate the Commission's *substantive* regulatory purpose of protecting "*the relevant public interest*" against "*excessive prices*" for dry and residue gas sold in interstate commerce from September 1961 to September 1972.

II.

STATEMENT OF THE CASE

On January 11, 1952 the fifteen individual respondents herein, Frank J. Hall, et al, and Arkla contracted for respondents, as "*royalty interest owners-working interest owners-overriding royalty interest owners-sellers*", to supply natural gas, condensate, extractable liquid hydrocarbons and

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[11]See: F.P.C. clarifying "*Order*" dated November 8, 1976, Ex. D-59, J.A. 183.

[12]See: F.E.R.C. "*Orders*" dated April 25, 1979, May 18, 1979 and July 16, 1979, respectively, which are attached to this brief at Appendices A, B & C.

plant products produced from their leases in the Sligo Gas Field, Bossier Parish, Louisiana to Arkla for 28 years at the "*highest prices*" that Arkla "*paid*" to anyone else for comparable production produced from the *same* Sligo Gas Field under any agreement, "*written or oral*".[13] Obviously, in order for respondents to timely receive and obtain the legal fruits and benefits of their "*favored nations*" rights under the 1952 contract, it was necessary for Arkla, as the contractual obligor under the subject "*favored nations*" clause, to timely honor and cooperatively fulfill its affirmative legal duty[14] to advise and inform respondents when it began paying "*higher prices*" to other mineral interest owners in the Sligo Gas Field.

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[13]See: The sworn testimony of Frank J. Hall, R.3523 & 3524, R.3528 & 3529, R.4962 & 4963; Ex. P-272, R.3493; and the sworn testimony of Arkla's *own* in-house counsel, Gilbert L. Hetherwick, R.4221 thru 4225.

Moreover, the unanimous and consistent decisions of the courts below with respect to a proper construction and interpretation of the subject "*favored nations*" clause based upon the "*true intentions*" of the parties when they negotiated and perfected the subject "*favored nations*" contract in January 1952 are entirely consistent with the independent "*concern*" that Arkla's Senior Vice President, Billy E. Harrell, expressed to Arkla's top officers and officials in his "*warning memorandum*" dated November 20, 1961 (see Ex. P-58, J.A. 139) with respect to Arkla's payment of "*higher prices*" to the United States government for the government's royalty gas produced from the *same* Sligo Gas Field and delivered into Arkla's *same* Sligo gas processing plant. See, also: *Eastern Petroleum Co., et al v. Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971) and *Louisiana Land & Exploration Co. v. F.E.R.C.*, 574 F.2d 204 (5th Cir. 1978), writs *denied*, 439 U.S. 1127 (1979).

[14]Contrary to Arkla's obviously erroneous and self-serving contentions in this proceeding, Arkla under well established principles of Louisiana Civil Law (Articles 1901, 1903, 1930 and 2040 of the Louisiana Civil Code) and Common Law (see the authorities cited in 17A C.J.S., Contracts, §328, Note 41, at pp. 286 & 287) unquestionably had an affirmative legal duty and contractual obligation under the January 11, 1952 "*favored nations*" contract with respondents to *cooperate* with respondents to the fullest in order to

Beginning in September 1961, Arkla, unbeknown to respondents, began breaching and violating respondents' "*favored nations*" rights by paying "*higher prices*" to the United States government for the government's residue royalty gas, condensate, extractable liquid hydrocarbons and plant products as produced from the *same* Sligo Gas Field and delivered into Arkla's *same* Sligo gas processing plant from 1961 through 1975.[15] Arkla, as respondents' private contractual obligor under the 1952 "*favored nations*" contract, compounded its breach and violation of the "*favored nations*" contract by uncooperatively advising and informing respondents from 1961 to 1974 that they were receiving for their royalty gas, working interest gas, overriding royalty interest gas, condensate, extractable liquid hydrocarbons and plant products the "*highest prices*" that Arkla was paying to anyone else in the

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insure that respondents timely received the legal fruits and benefits of their private legal and contractual "*favored nations*" rights in a manner consistent with the "*true intentions*" of the parties who negotiated and perfected the contract in January 1952 and all applicable laws, rules and regulations from September 1961 thru December 1975; and Arkla cannot be heard to complain in that it violated its affirmative legal duty and obligation to timely cooperate with respondents to the fullest from 1961 to 1975. See, also: *Gulf Oil Corp. v. American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Eastern Petroleum Co., et al v. Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla.S.Ct. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. 1976); *Whitfield Cons. Co., Inc. v. Commercial Devel. Corp.*, 392 F.Supp. 982 (1975); and *Louisiana-Nevada Transit Co. v. Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

[15]See: Section 2(n) of Arkla's January 1961 protective lease contract with the United States government, Ex. P-45, J.A. 121, 126; Arkla's November 15, 1962 "letter contract" with the United States government, Ex. P-82, J.A. 146; Arkla's "*Gas Purchase Account*" checks, Ex. P-85 thru P-138, R.2501, 2502, 2884 & 2885; and the monthly production and sales reports for the government parcel #3, Ex. P-52, R.2644, 2650.

Sligo Gas Field, when in fact Arkla was paying *"higher prices"* to the United States government.[16]

Respondents did *not* discover any of the true facts concerning Arkla's contractual agreements with the United States government and the *"higher prices"* paid by Arkla to the United States government pursuant thereto until June 26, 1974 when respondents' undersigned counsel pursuant to the *"Freedom of Information Act"* received a letter from the United States Department of the Interior dated June 25, 1974 (Exs. P-142 & P-143, R.2604, 2608, 2622 & 2722). Due to the fact that Arkla continued to uncooperatively withhold all of the true facts concerning its contractual agreements with the United States government and the *"higher prices"* paid by Arkla to the United States government under said contractual agreements, it became necessary for respondents to file a breach of contract lawsuit against Arkla in order to judicially discover and obtain all of the true facts concerning Arkla's breach of contract for the prior 14 years from Arkla's *own* private corporate files and records and to recover compensatory damages from Arkla's *own* abundant private corporate assets and profits for all of their actual losses and damages. Subsequently, Arkla itself invoked the original and concurrent jurisdiction of the Louisiana courts below in order to have

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[16]The sworn testimony of Frank J. Hall, R.3563 thru 3573 and R.4961 thru 4964; W. E. Hall, Jr., R.3751 thru 3752 and R.3786 thru 3796; and Arkla's Senior Vice President, B. E. Harrell, R.4536 & 4562, confirmed that Arkla had uncooperatively and inaccurately advised and informed respondents from 1961 to 1974 that respondents, as *"royalty interest owners-working interest owners-overriding royalty interest owners-sellers"*, were receiving the *"highest prices"* that Arkla paid to anyone else in the Sligo Gas Field when in fact Arkla was paying *"higher prices"* to the United States government under section 2(n) of the 1961 lease contract (Ex. P-45, J.A. 121) and the November 15, 1962 *"letter contract"* (Ex. P-82, J.A. 146) by means of monthly checks drawn and issued on Arkla's *"Gas Purchase Account"* (Ex. P-85 thru P-138, R.2501, 2502, 2884 & 2885).

Moreover, Arkla's own *"internal memorandums"* and *"letters"*, as prepared by Arkla's *own* officers and officials from November 20,

those courts definitively resolve and adjudicate the private breach of contract and damage dispute between respondents and Arkla.[17]

Before the instant breach of contract case was tried on its merits before the Louisiana district court below, both the United States District Court for the Western District of Louisiana[18] and the F.P.C.[19] thoroughly reviewed the case, declined to exercise their jurisdiction over the case and deferred the resolution and adjudication of the instant private breach of contract and damage dispute between respondents and Arkla to the Louisiana state courts.

1961 through August 19, 1975 and which were judicially discovered and obtained by respondents in this case from Arkla's *own* private corporate files and records, clearly establish and confirm that Arkla uncooperatively withheld all of the true facts concerning its contractual agreements with the United States government from respondents for 14 years in order to avoid "*a difficult problem*" with respect to honoring respondents' "*favored nations*" rights and, hence, save Arkla and its stockholders "*millions of dollars*" at respondents' loss, damage, detriment and expense. See: Exs. P-58, J.A. 139; P-62, J.A. 140; P-64, J.A. 141; P-77, J.A. 143; P-80, J.A. 144; P-81, J.A. 145; P-82, J.A. 146; P-174, J.A. 147; P-176, J.A. 152; P-177, J.A. 153; P-178, J.A. 154; and P-192, J.A. 155.

[17]See: Arkla's "*Petition-In-Reconvention*", J.A. 192, and Arkla's "*Motion for Separate Trial of Certain of the Actions Cumulated in this Suit*", J.A. 201, wherein Arkla affirmatively invoked the original and concurrent jurisdiction of the Louisiana state courts over the instant private breach of contract and damage dispute.

[18]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, Docket No. CA 75-1168 (Dist.Ct.W.D. La. 1976), "Judgment of Remand" rendered on February 2, 1976 pursuant to 28 U.S.C. 1447 (c) and (d), J.A. 160, 173 & 175.

[19]*Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Power Commission, "Orders" issued on March 8, 1976, November 8, 1976 and January 7, 1977, respectively, J.A. 177, 183 & 188.

Specifically, the Federal Power Commission in deferring this private breach of contract case to the Louisiana state courts correctly determined and concluded that:

A. "*Order*" dated March 8, 1976:

"The jurisdictional issue before us arises out of an alleged breach of contract by Arkla for its failure to pay the respondents a higher rate for natural gas pursuant to the favored nations clause in the underlying sales contract.

... It has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court. An examination of two prior Commission decisions is indicative of this policy ...

The circumstances of the dispute between Arkla and Respondents do not call for any different result than that reached in the *Pan American* case, *supra*, or the *Rowan* case, *supra*. This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction ... While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions." See: Ex. D-55, J.A. 177.

B. "*Order*" dated November 8, 1976:

"Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through the year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its '*Other Southwest Area Rate*' Opinion Nos. 607 and 607-A. The respective area base rate ceilings for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:

Prior to January 1, 1965	From Jan. 1, 1965 Thru Sept. 30, 1968	From October 1, 1968 Thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery.

Respondents also request that the Commission set forth and state:

> 'I. That the Federal Power Commission pursuant to the Natural Gas Act, has not, since September, 1961 to the present date, regulated, limited or restricted the rates or prices which the respondents herein, if contracturally authorized, could and should have been paid for their liquid hydrocarbons, gasoline, and plant products extracted from the wet or casinghead gas and which were sold to Arkansas Louisiana Gas Company pursuant to the January 11, 1952 "Most Favored Nation" contract and the related Arkansas Louisiana Gas Company division order contracts.'

While the Commission has jurisdiction over natural gas containing *liquefiable* hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream.[4] Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether the respondents are entitled under their sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract. Since, as we indicated in our order issued March 8, 1976, herein, it is appropriate for a court to resolve contract questions pertaining to the sale of natural gas, it is clear that a court would also have jurisdiction to decide this contractual issue.

4. Mobil Oil Corporation v. Federal Power Commission, 483 F.2d 1238 (CADC 1973)."

See: Ex. D-59, J.A. 183.

C. "*Order*" dated January 7, 1977:

> "Arkla originally had sought a determination that the 'favored nations' clause in its January 11, 1952, contract with Frank J. Hall, *et al.* (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla. We held in our order issued March 8, 1976, that we would defer to the court to decide this contract issue ...
>
> Arkla's application for rehearing presents no facts or legal principles that would warrant any change in or modification of the Commission's order issued November 8, 1976." See: Ex. D-72, J.A. 188.

After the United States District Court for the Western District of Louisiana and the Federal Power Commission consistently declined jurisdiction over the instant breach of contract dispute and deferred the resolution and adjudication of the instant breach of contract dispute to the Louisiana state courts, both respondents and Arkla underwent 6 years of expensive, burdensome and protracted breach of contract litigation through the Louisiana state courts. The Louisiana supreme court on March 5, 1979[20] finally concluded and held that Arkla had wrongfully breached and violated respondents' private legal and contractual "*favored nations*" rights from September 1961 through December 1975 and had wrongfully injured and damaged respondents for 14 years by "*preventing*" and "*precluding*" respondents from timely receiving and obtaining the legitimate fruits and benefits of their "*favored nations*" rights in a manner consistent with the "*true intentions*" of the parties and all applicable laws, rules and regulations from September 1961 through December 1975. The Louisiana supreme court in reaching its decision expressly took cognizance of and relied upon the correct determinations of the F.P.C. as set forth in the F.P.C.'s clarifying "*Order*" dated November 8, 1976, Ex. D-59, J.A. 183. See that portion of

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[20]See: *Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 368 So.2d 984 (La.S.Ct. 1979), J.A. 51.

Louisiana supreme court's judgment of March 5, 1979 beginning at page 62 of the Joint Appendix.

With respect to the quantum of compensatory damages issue presented in this case, Arkla, contrary to its position in this proceeding, has heretofore candidly disclosed and consistently maintained that:

A. *August 19, 1975:*

"The suit referred to was filed in the First District Court, Caddo Parish, in October 1974, by fifteen plaintiffs, against the Company ... It should also be stated that plaintiff's demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000.

... [i]t is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospects ..."
See: Ex. P-192, J.A. 155.

B. *March 19, 1976:*

"The Company in the last two or three years has experienced litigation involving several of its gas purchase contracts, arising basically from the difference between earlier and current prices for gas under producer sales. No one of these legal actions is material as that term is generally defined. Some of these have been settled, settlements of others is expected and at least one involving a claim estimated at a maximum of $3.5 million is still pending."
See: Ex. P-193, R.2795 & 2796.

C. *April 1976:*

"The lawsuit referred to in Item 5 of defendants Form 10-K filed March 1976 as 'one involving a claim estimated at a maximum of $3.5 million' is the present lawsuit."

"The material included in the report at Item 5 was prepared by the defendant's attorneys Gilbert L. Hetherwick and Robert Roberts, Jr."

"Insofar as Item 5 of defendant's Form 10-K, referred to

> in Interrogatory No. 11, is concerned, defendant's attorney Robert Roberts, Jr. made the estimate of the maximum amount which, if plaintiffs were wholly successful in their suit, might be recovered in the suit."
> See: Exs. P-194A, P-195A & P-196A, R.2812, 2813 & 2814.

Respondents, based upon the F.P.C.'s clarifying *"Order"* dated November 8, 1976 (Ex. D-59, J.A. 183) and the data as judicially discovered and obtained from Arkla's *own* private corporate files and records, computed through detailed calculations their actual losses and damages for the entire 1961 through 1975 period to be a minimum of $2,809,199.08 (See: Exs. P-319-A thru P-331, R.4008 thru 4068, as summarized on Ex. P-320-B, J.A. 158) with respect to their condensate, extractable liquid hydrocarbons, plant products *and* their dry and residue gas. The courts below, based upon the F.P.C.'s clarifying *"Order"* dated November 8, 1976 (Ex.D-59, J.A.183) and the other *evidence* contained in the record of this case, ultimately awarded the fifteen individual respondents herein compensatory damages in the aggregate sum of $2,738,888.40. Approximately $1,300,000 of these compensatory damages related to the actual losses that respondents sustained and incurred from September 1961 through December 1975 with respect to their condensate, extractable liquid hydrocarbons and plant products *and* approximately $1,400,000 of these compensatory damages related to the actual losses that respondents sustained and incurred with respect to their dry and residue gas from September 1961 through December 1975. With respect to the $1,400,000 in compensatory damages as awarded to respondents for the actual losses and damages attributable to their dry and residue gas from September 1961 through December 1975, approximately $1,000,000 of the losses were sustained and incurred from September 1961 through September 1972 and approximately $400,000 of these losses were sustained and incurred from October 1972 through December 1975.

After the Louisiana supreme court rendered its judgment herein on March 5, 1979 and denied Arkla's application for a

rehearing on April 9, 1979, the F.E.R.C. in reviewing the Louisiana supreme court's judgment of March 5, 1979 on April 25, 1979 issued an "*Order Requesting Additional Information To Supplement Record*" in order to obtain *all* of the relevant pleadings, evidence, and information necessary to perform its section 4 (d) "*review function*" and, thus, to verify and confirm that the compensatory damages as awarded to respondents for the actual losses attributable to their dry and residue gas for the period September 1961 through September 1972 were based upon and measured by "*contractually authorized*" prices, i.e. 11.7432¢ to 14.0508¢ per Mcf, which were *below* the Commission's established and approved "*maximum, lawful, just and reasonable area rate ceilings*" for the 1961 to 1972 period. Specifically, the F.E.R.C. in its "*Order*" dated April 25, 1979 (Appendix A to this brief) correctly noted and observed that:

> "To aid it in its determination of the jurisdictional questions in this case this Commission needs some additional information.
>
> This Commission is interested in the basis on which the Louisiana Courts awarded damages for gas. We want to know at what price per Mcf of gas the courts awarded damages to the Hall plaintiffs. We also want to know what damages were demanded by the plaintiffs in the Louisiana courts.
>
> (A) Hall, *et al.* to file with this Commission within ten days:
>
> (1) A copy of the complaint filed in the Louisiana proceedings, including all amendments to that complaint;
>
> (B) The parties to these proceedings to file with the Commission within ten days:
>
> (1) A summary of the damages awarded by the Louisiana Courts. The summary shall show what price per Mcf of gas the Louisiana Courts decided that the Hall plaintiffs were entitled to broken down by time periods. We are specifically interested in

damages for the gas as opposed to damages awarded for any extracted liquids. A party may wish to provide a breakdown of the total damages showing the damages per Mcf for the gas, and the damages per Mcf for the liquids. But each party must show the damages per Mcf for the gas for every time period. We also stress that we want a summary showing what the Louisiana Courts actually did rather than any attempt to relitigate the damages determined by the Louisiana Court. In its summary each party shall explain the evidentiary basis of its summary and shall include copies of the evidence it believes was actually used by the courts in determining damages; ..."

After both respondents and Arkla produced and provided true copies of the requested pleadings, evidence and information to the F.E.R.C., the F.E.R.C. by virtue of its *"Order"* dated May 18, 1979 performed its section 4 (d) *"review function"* with respect to respondents; *"severable"* and *"contractually authorized"* prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 in order to fulfill its regulatory responsibility of protecting *"the relevant public interest"* against *"excessive prices"* for residue natural gas sold in interstate commerce from September 1961 through September 1972. The Commission in its *"Order"* dated May 18, 1979 correctly concluded and confirmed that:

"The Court concluded that the intentions of the parties were not to limit the activation of the favored nation clause only to situations where there was a technical 'purchase,' 'seller,' or 'price.' The Court decided that royalty payments were within the intentions of the parties when they drafted the favored nation clause ...

The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract ...

As noted above, the FPC declined to issue a declaratory order construing the most favored nation clause in the Arkla-Hall contract. It held that there was concurrent jurisdiction with the state court and that it would defer to that court.

The FPC stated that there is a '[c]ommission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in state court.'

While we concur in the result reached by the FPC, we do not subscribe to its rationale ...

On April 25, 1979, we issued an 'Order Requesting Additional Information to Supplement Record.' Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this Commission's November 8, 1976, 'Order Clarifying and Amplifying Commission Order Denying Rehearing' we stated:

> While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate ...

... [W]e find that the rates requested are within what the Commission has determined to be the zone of reasonableness ...

The Louisiana Supreme Court, however, has awarded

damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972 ...

On the facts of this case, the damages do not exceed applicable area ceiling rates. The Louisiana Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group. In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed. The Supreme court of Louisiana further stated:

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction."

See Appendix B to this brief.

The F.P.C. on July 16, 1979 *denied* Arkla's petition for a rehearing with respect to its "*Order*" of May 18, 1979 (See: Appendix C to this brief).

Meanwhile, the F.E.R.C. in an "Amici Curiae Brief", as filed with this Court on June 3, 1979 in Docket No. 78-986, concluded and confirmed that:

"The complaints sought recovery under the provisions of private contracts. 'The rights as asserted by [respondents] are traditional common law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.' *Pan American Petroleum Corp. v. Superior Court,* 366 U.S. 656, 663 (1961). Moreover, unlike regulatory schemes that require uniform rates to all customers, the Natural Gas Act 'expressly recognizes that rates to particular customers may be set by individual contracts,' *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338 (1956). As the Commission observed in its order of May 18, 1979 (App., *infra*, 9a), its 'role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.' See also *United Gas Co. v. Memphis Gas Division*, 358 U.S. 103, 109-110, 112-114 (1958).

The Natural Gas Act may reinforce private contractual rights or abrogate them when they contravene relevant public interests. See e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 884 (1968). However, absent adverse effects on the interests protected by the regulatory scheme — for example, prices in excess of established ceilings — the parties should be left to the bargain they have made. This is an appropriate rule even though, under Section 4 (c) of the Natural Gas Act, 15 U.S.C. 717c(c), every contract for the interstate sale of gas had to be filed with the Commission. Otherwise, the Commission and the federal courts would be inundated by 'a vast current of [contract] litigation indubitably arising under State law****.' *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667, 673 (1950) ...

Nor does construction of the favored nations clause on the basis of the intentions of the contracting parties affect the Commission's regulatory responsibilities. Resolution of the dispute turns on evidence of dealings between the parties relevant only to this case ...

The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the

unbalancing of existing rate structures (*United States v. Radio Corporation of America, supra,* 358 U.S. at 348), no such issues were presented.

Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act ...

Since the measure of damages claimed turned on lease payments to the United States which did not exceed Commission applicable area ceilings (App. infra, 15a), there was no question concerning the reasonableness of the rates for the Commission to consider."

Consistent with the prior and correct determinations of the F.P.C., the Louisiana supreme court, and the F.E.R.C. with respect to the quantum of compensatory damages issue in this case, the Louisiana state court of appeal on January 22, 1980[21] again confirmed that:

"On the basic contract question (to use terminology frequently used by FERC) the effect of the lower court's finding, which we again approve, is that the contract shall be interpreted to entitle these plaintiffs to damages measured by what Arkla paid the United States for its gas and for LHC products severed from its gas ...

The Supreme Court of Louisiana agreed and FERC so understood.

'The Louisiana courts found that the contract provided for a price for the [LHC] products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.'

Footnote 19, FERC, May 18, 1979, cited supra in Footnote 5."

See: J.A. 72.

Moreover, the F.E.R.C. in the original edition of its "Order Denying [Respondents'] Application For Waiver of Filing Re-

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[21]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 379 So.2d 1142 (La.App.2d 1980), J.A. 72.

quirements" dated November 5, 1980 again consistently confirmed that:

> "The rates (11.7432 cents per Mcf to 14.0508 cents per Mcf) would, however, be within the Commission ceilings in effect during that time ...
>
> We recognize the determination of the Louisiana courts that the Hall group did not file for a rate increase in 1961 because Arkla withheld from the Hall group information that the Louisiana courts found Arkla was required to give the Hall group, and we realize that as between the Hall group and Arkla, the equities are favorable to the Hall group."[22]

Arkla, in continuing its efforts to escape and evade its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant private corporate assets and profits for all of the actual losses and damages which it wrongfully caused respondents to sustain and incur from September 1961 through December 1975, filed three petitions for a writ of certiorari with this Court, i.e. Docket Nos. 78-986, 78-1789 and 79-1896.

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[22]The F.E.R.C. on November 6, 1980 issued an "*Errata Notice*" whereby it under the guise of a "printing error" deleted footnote 4 on page 2 of the original edition of this November 5, 1980, "*Order*" in its entirety, whereby F.E.R.C. had again confirmed that respondents' "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 were well *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*" for the 1961 to 1972 period.

Based upon principles of fundamental justice and the decisions of the courts in Plaquemines Oil and Gas Co. v. F.P.C., 450 F.2d 1334 (D.C. Cir. 1971), The City of Piqua, Ohio v. F.E.R.C., 610 F.2d 950 (D.C. Cir. 1979) and numerous other cases, respondents timely perfected an appeal to the United States Fifth Circuit Court of Appeals in the proceeding captioned and styled "*Frank J. Hall, et al v. F.E.R.C.*," Docket No. 81-4011, whereby respondents have sought review and reversal of the F.E.R.C.'s "Order Denying Application for Waiver of Filing Requirements" dated November 5, 1980 and

Arkla, in its first petition for a writ of certiorari as filed with this Court on December 18, 1978 in Docket No. 78-986, asserted and specified two alleged errors with respect to the decisions rendered by the United States District Court for the Western District of Louisiana, the Louisiana state district court, the Federal Power Commission, the Louisiana state court of appeal, the Louisiana supreme court and the Federal Energy Regulatory Commission with respect to the jurisdictional issue and the liability and breach of contract issue presented in this case. In light of the specific circumstances of this case, the consistent and unanimous decisions of these six tribunals and the applicable and controlling cases,[23] this Court by virtue of an *"Order"* issued on October 1, 1979 properly *denied* Arkla's first petition for a writ of certiorari in Docket

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the F.E.R.C.'s "Errata Notice" dated November 6, 1980. Respondents' appeal is presently pending on the docket of the United States Fifth Circuit Court of Appeals. Arkla and the F.E.R.C. filed a "Joint Motion" seeking to have respondents' appeal transferred from the United States Fifth Circuit Court of Appeals to the United States Court of Appeals for the District of Columbia Circuit. That motion was *denied* on March 13, 1981.

[23]Skelly Oil Company, et al v. Phillips Petroleum Co., 339 U.S. 667 (1950); United Gas Pipe Line Co. v. Mobile Gas Corporation, 350 U.S. 332 (1956); United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958); Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); Gulf Oil Corp. v. American-Louisiana Pipeline Co., 282 F.2d 401 (6th Cir. 1960); Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., 297 F.2d 561, 566 (8th Cir. 1962); State of Louisiana v. F.P.C., 503 F.2d 844 (5th Cir. 1974); Skelly Oil Co. v. F.P.C., 532 F.2d 177 (10th Cir. 1976); Monsanto Co. v. F.P.C., 463 F.2d 799 (D.C. Cir. 1972); International Paper Co. v. F.P.C., 476 F.2d 121 (5th Cir. 1973); City of New Orleans, La. v. United Gas Pipe Line Co., 390 F.Supp. 861 (E.D.La. 1974); Louisiana-Nevada Transit Co. v. Woods, 393 F.Supp. 177 (W.D. Ark. 1975); Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569

No. 78-986. See: 444 U.S. 878 (1979). Subsequently, Arkla, in connection with its two specifications of alleged error relating to the jurisdictional issue *and* the liability and breach of contract issue as asserted in its first petition in Docket No. 78-986, filed a petition for rehearing with this Court on May 30, 1980. This Court by virtue of an *"Order"* issued on July 2, 1980 properly *denied* Arkla's petition for rehearing in Docket No. 78-986.

In connection with the quantum of compensatory damages issue as adjudicated by the courts below in this private breach of contract case on the basis of the *"severable prices"* that Arkla paid the United States government from 1961 to 1975 and the F.P.C.'s clarifying *"Order"* dated November 8, 1976 (Ex. D-59, J.A. 183), Arkla filed a second petition for a writ of certiorari with this Court on May 29, 1979 in Docket No. 78-1789 (the instant proceeding) whereby Arkla sought to have this Court reduce the quantum of compensatory damages awarded to respondents from approximately $2,700,000 to $1,700,000 based upon the unconscionable *"Catch-22"* contention that under our American System of Justice respondents may not recover compensatory damages out of Arkla's *own* abundant private corporate assets (now over $1,000,000,000) and profits (now over $120,000,000 each year) for the actual losses and damages (approximately $1,000,000) which Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 *because* Arkla through its *own* continued breach of contract for 14 years *and* its *own* uncooperative and effective withholding of all of the true facts from respondents from 1961 to 1975 wrongfully *prevented* and *precluded* respondents from having the information necessary

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(7th Cir. 1971); Phillips Petroleum Co. v. F.P.C., 349 F.2d 535 (10th Cir. 1965); Shell Oil Co. v. F.P.C., 531 F.2d 1324 (5th Cir. 1976); Merle M. Rowan v. Allied Chemical Corp., 39 F.P.C. 64 (1968), "Order" issued January 17, 1968.

to timely prepare and prospectively file routine notices setting forth their *"severable"* and *"contractually authorized"* prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas under the private 1952 *"favored nations"* contract with the F.P.C. pursuant to section 4 (d) of the Natural Gas Act for the limited period September 1961 through September 1972. This Court on January 19, 1981 *granted* certiorari in Docket No. 78-1789.

Arkla, in an alternative effort to reduce the quantum of compensatory damages awarded to respondents by the courts below from approximately $2,700,000 to $2,400,000, filed a third petition for a writ of certiorari with this Court on May 30, 1980 in Docket No. 79-1896. Arkla, in its third petition for a writ of certiorari, Docket No. 79-1896, has reasserted the same contentions that were set forth in its first petition for a writ of certiorari in Docket No. 78-986 (see pp. 22 & 23 of its "Original Petition" dated December 18, 1978) and in its petition for rehearing in Docket No. 78-986 dated May 30, 1980 (see pp. 17 & 18 of its petition for rehearing) concerning a *"contractual determination"* that was also properly deferred by the F.P.C. (see F.P.C. *"Order"* dated November 8, 1976, Ex. D-59, J.A. 183, 184 & 185) to the Louisiana courts and was also properly resolved by the Louisiana courts with respect to respondents' *"contractual entitlement"* to the same *"favored nations"* treatment and the same *"severable prices"* that Arkla granted to the United States government for the government's condensate, extractable liquid hydrocarbons and plant products severed from its royalty gas. This Court has not yet acted on Arkla's third petition for a writ of certiorari in Docket No. 79-1896.

III.

SUMMARY OF ARGUMENT

1.

In light of the evidence contained in the record of this case and consistent with well established principles of fundamental

American justice, Arkla (the uncooperative and defaulting wrongdoer in this case) and its *own* private stockholders must, like all other uncooperative and defaulting pipeline companies and their private stockholders, separately and independently bear the legal and financial responsibility for all of the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur from 1961 to 1975 due to Arkla's *own* continued breach of contract for 14 years and Arkla's *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 to 1975.[24]

2.

Contrary to Arkla's wholly erroneous and self-serving contentions in this proceeding, the "*integrity*" of respondents' fundamental and traditional contract rights to independently recover compensatory damages out of Arkla's *own* abundant private corporate assets and profits for the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 "*do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas*".[25]

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[24] See: Skelly Oil Company, et al v. Phillips Petroleum Co., 339 U.S. 667 (1950); Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961); Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); Louisiana-Nevada Transit Co. v. Woods, 393 F.Supp. 177 (W.D. Ark. 1975). See, also: Articles 1901, 1903, 1930, 1931 and 2040 of the Louisiana Civil Code.

[25] See: Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332 (1956); United Gas Pipe Line Company v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958); Pan American Petroleum

3.

In light of the evidence contained in the record of this case and consistent with well established principles of fundamental American justice, Arkla, the uncooperative and defaulting wrongdoer in this private breach of contract case, is clearly "*estopped*" from legally relying upon and unjustly taking advantage of its own continued breach of contract from September 1961 through December 1975 and its *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from September 1961 to December 1975 in order to unilaterally escape and evade its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant corporate assets and profits for all of the actual losses and damages that it had wrongfully caused respondents to sustain and incur with respect to their dry and residue natural gas from September 1961 through September 1972.[26]

Corp. v. Superior Court, 366 U.S. 656 (1961); Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., 297 F.2d 561, 566 (8th Cir. 1962); Monsanto Co. v. F.P.C., 463 F.2d 799 (D.C. Cir. 1972); Skelly Oil Co. v. F.P.C., 532 F.2d 177 (10th Cir. 1976); Shell Oil Co. v. F.P.C., 531 F.2d 1324 (5th Cir. 1976); State of Louisiana v. F.P.C., 503 F.2d 844 (5th Cir. 1974); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and certiorari denied, 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); City of New Orleans, La. v. United Gas Pipe Line Co., 390 F.Supp. 861 (E.D.La. 1974).

[26]See: United States v. Peck, 102 U.S. 64 (1880); Story Parchment Co. v. Paterson P. Paper Co., 282 U.S. 555 (1931); R. H. Stearns Co. v. United States, 291 U.S. 54 (1934); Dietrick v. Greaney, 309 U.S. 190 (1940); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Ballard v. El Dorado Tire Co., 512 F.2d 901 (5th Cir. 1975); Ammerman v. Miller, 488 F.2d 1285 (D.C. Cir. 1973); Perrin v. Rodriguez, 153 So. 555 (La. 1934); Gulf Oil Corp. v. American-Louisiana Pipeline Co., 282 F.2d 401 (6th Cir. 1960); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla.

4.

As confirmed by the court in *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976):

> "In the Oklahoma suit Western's claim was for breach of contractual obligations ... Although passage of the Natural Gas Act (specifically section 7(b)) may have given Cities an effective means by which it could frustrate El Paso's prior contractual rights and prevent Western from entering into a more lucrative arrangement with El Paso, the Oklahoma jury and courts found that the Act did not shield Cities from breach of contract liability ...
>
> To be sure, the price per Mcf of Western's gas, if deliveries continued to Cities, was one important factor in the Oklahoma jury's determination of a proper measure of damages ... the Oklahoma courts and the FPC were confronted with separate and distinct issues — the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the Natural Gas Act to pay the just and reasonable rate for gas severed and delivered to it ...
>
> In its 18 March order the FPC correctly distinguished between Cities' obligation under the Act to pay the just and reasonable rate for gas delivered to it (the issue before the Commission) and Cities' separate and independent obligation to respond in damages for private contractual breaches (the issue before the Oklahoma courts) ..."

In light of the consistent and definitive determinations of

1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); George W. Garig Transfer v. Harris, 75 So.2d 27 (La.S.Ct. 1954). See, also: Article 2040 of the Louisiana Civil Code; Restatement of Contracts, §§294 and 295 (1932); 5 S. Williston, Contracts, §677 (3d ed. 1961); 17A C.J.S. Contracts, §468a and b (1963); Corbin on Contracts, §1266. (1951 ed.).

the F.P.C.,[27] the Louisiana courts,[28] and the F.E.R.C.[29] in connection with the quantum of compensatory damages issue in this private breach of contract case and respondents' *"severable"* and *"contractually authorized"* prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972, it is clear beyond dispute that Arkla's separate and independent corporation obligation to respond in compensatory damages out of its own abundant private corporate assets and profits for its violation of private contract rights does *not* in any way present or involve any question concerning the Commission's regulatory responsibility to protect consumers from *"excessive," "unjust"* or *"unreasonable"* rates for dry and residue natural gas sold in interstate commerce. In connection with this private breach of contract case, the Commission has fulfilled its substantive regulatory purpose under section 4 (d) of the Natural Gas Act by *"reviewing"* respondents' recovery of compensatory damages measured by *"contractually authorized"* prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 in order to fully protect consumers from *"excessive, unjust and unreasonable prices"* for dry and residue natural gas sold in interstate commerce from 1961 to 1972.

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[27]*Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Power Commission, "*Orders*" issued on March 8, 1976, November 8, 1976 and January 7, 1977, respectively, J.A. 177, 183 & 188.

[28]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, Docket No. 225,699, First Judicial District Court, Caddo Parish, La., "Judgment" rendered on October 14, 1977, J.A. 7, 19

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, 368 So.2d 984 (La.S.Ct. 1979), J.A. 51, 62.

Frank J. Hall, et al v. Arkansas Louisiana Gas Company, 379 So.2d 1142 (La.App.2d 1980), J.A. 72, 83.

[29]*Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Energy Regulatory Commission, "*Orders*" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively. See: Appendices A, B & C to this brief.

IV.

ARGUMENT

1.

In connection with the instant private breach of contract case, Arkla, respondents and the courts below have after more than 6 years of litigation independently determined that respondents have sustained actual losses and damages with respect to their condensate, extractable liquid hydrocarbons, plant products *and* their dry and residue gas of at least $2,700,000 to "*a maximum of $3,500,000*" due to Arkla's continued breach and violation of the private 1952 "*favored nations*" contract from September 1961 through December 1975 and Arkla's *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 through 1975.

Just as the courts properly required the Kerr-McGee Corporation,[30] Cities Service Gas Company,[31] and the Louisiana-Nevada Transit Company,[32] as defaulting and uncooperative pipeline companies, to separately and independently respond in compensatory damages out of their *own* abundant private corporate assets and profits for all of the actual losses and damages wrongfully caused by their uncooperative breaches and violations of similar private gas sales contracts, the Louisiana supreme court below by applying well established principles of fundamental American justice to the evidence in this case properly required Arkla, the uncooperative and

[30]See: Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971).

[31]See: Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972) and Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. 1976).

[32]See: Louisiana-Nevada Transit Co. v. Woods, 393 F.Supp. 177 (W.D. Ark. 1975).

defaulting pipeline company in this case, to separately and independently respond in compensatory damages out of its *own* abundant private corporate assets and profits of all of the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur from 1961 through 1975 due to its continued breach of contract for 14 years and its uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 to 1975.

It is a well established principle of fundamental American justice that an award of compensatory damages for losses caused by the breach and violation of a contractual agreement must be sufficient to "*place the injured party, as near as may be possible, in the same situation he would have occupied if the wrong had not been commited.*" [33] Arkla's separate and independent payment of compensatory damages out of its *own* abundant private corporate assets (now over $1,000,000,000) and profits (now over $120,000,000 each year) for respondents' actual losses and damages in this case will do nothing more than justly compensate respondents for their actual losses and damages and only slightly reduce the amount of cash dividends received by Arkla's private stockholders in any one year (which cash dividends now exceed $30,000,000 each year). Again, as Arkla independently disclosed and correctly confirmed to the Federal Securities and Exchange Commission

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[33]See: Wicker v. Hoppock, 73 U.S. 752 (1867); Globe Refining Co. v. Londa Cotton Oil Co., 190 U.S. 1171 (1903); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 407 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. 1976); Louisiana-Nevada Transit Co. v. Woods, 393 F. Supp. 177 (W.D. Ark. 1975). See, also: Articles 1901, 1903, 1930, 1931 and 2040 of the Louisiana Civil Code; 25 C.J.S., Damages, §74, p.843; and McCormick on Damages, §137, P.560.

in connection with this private breach of contract case on August 19, 1975:

> "The suit referred to was filed in the First District Court, Caddo Parish, in October 1974, by fifteen plaintiffs, against the Company ... It should also be stated that plaintiffs' demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000 ... [i]t is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospects ..." See: Ex. P-192, J.A. 155.

2.

Contrary to Arkla's wholly erroneous and obviously self-serving contentions in this proceeding, respondents' basic and fundamental civil law contract rights to independently recover compensatory damages out of Arkla's *own* abundant private corporate assets and profits for the actual losses and damages that Arkla wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 through September 1972 *"do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas."*[34]

The principle that the Natural Gas Act did *not* destroy the *"integrity"* and *"stability"* of private contractual agreements *or* relieve and shield uncooperative and defaulting pipeline companies from their separate and independent corporate obligation to respond in compensatory damages out of their own abundant private corporate assets and profits for the actual losses and damages caused and occasioned as a result of their breach and violation of their private gas sales contracts has heretofore been consistently recognized and confirmed by this Court, to wit:

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[34]See: Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656, 663 (1961).

A. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950):

"If Phillips sought damages from petitioner or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts."

B. *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956):

"In construing the [Natural Gas] Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such ...

... By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry ... The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other ..."

C. *United Gas Pipe Line Company v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958):

"It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake ... This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry, c.f. Federal Power Com. v. Hope Natural Gas Co., 320 US 591, 603, 88 L.ed 333, 345, 64 S.Ct. 281, and we think that it did so ... by preserving the 'integrity' of private contractual arrangements for the supply of natural gas."

D. *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961):

"Suit was brought in a state court on a common-law contract claim ... The rights as asserted by Cities Service are

> traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas ...
>
> We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Service has formulated. Affirmed."

In light of the applicable and controlling decisions of this Court, the principle that the Natural Gas Act was *never* intended by Congress to destroy the *"integrity"* and *"stability"* of private contractual agreements *or* to shield uncooperative and defaulting pipeline companies from their separate and independent corporate obligation to respond in compensatory damages out of their *own* abundant private corporate assets and profits for the actual losses and damages caused and occasioned as a result of their breach and violation of their private gas sales contracts has also heretofore been consistently recognized and correctly confirmed by all other courts of this Nation. See: *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp. v. American-Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561, 566 (8th Cir. 1962); *Monsanto Co. v. F.P.C.*, 463 F.2d 799 (D.C. Cir. 1972); *Skelly Oil Co. v. F.P.C.*, 532 F.2d 177 (10th Cir. 1976); *Shell Oil Co. v. F.P.C.*, 531 F.2d 1324 (5th Cir. 1976); *State of Louisiana v. F.P.C.*, 503 F.2d 844 (5th Cir. 1974); *City of New Orleans, La. v. United Gas Pipe Line Co.*, 390 F. Supp. 861 (E.D.La. 1974).

In light of the applicable and controlling decisions of this Court and all other courts of this Nation on this well established point, the F.E.R.C. and the United States, in an "Amici Curiae Brief" filed with this Court on June 3, 1979 in connection with this private breach of contract case in Docket No.

78-986 at pages 11, 12, 15 and 16, again consistently concluded and correctly confirmed that:

> "The complaints sought recovery under the provisions of private contracts. 'The rights as asserted by [respondents] are traditional common law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.' Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961). Moreover, unlike regulatory schemes that require uniform rates to all customers, the Natural Gas Act 'expressly recognizes that rates to particular customers may be set by individual contracts,' *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338 (1956). As the Commission observed in its order of May 18, 1979 (App., *infra*, 9a), its 'role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.' See also *United Gas Co. v. Memphis Gas Division*, 358 U.S. 103, 109-110, 112-114 (1958).
>
> The Natural Gas Act may reinforce private contractual rights or abrogate them when they contravene relevant public interests. See e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). However, absent adverse effects on the interests protected by the regulatory scheme — for example, prices in excess of established ceilings — the parties should be left to the bargain they have made. This is an appropriate rule even though, under Section 4(c) of the Natural Gas Act, 15 U.S.C. 717c(c), every contract for the interstate sale of gas had to be filed with the Commission. Otherwise, the Commission and the federal courts would be inundated by 'a vast current of [contract] litigation indubitably arising under State law****.' *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667, 673 (1950) ...
>
> The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures (*United States v.*

Radio Corporation of America, supra, 358 U.S. at 348), no such issues were presented.

Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act ...

Since the measure of damages claimed turned on lease payments to the United States which did not exceed Commission applicable area ceilings (App., *infra,* 15a,), there was no question concerning the reasonableness of the rates for the Commission to consider."

3.

In light of Arkla's continued breach and violation of respondents' private legal and contractual "*favored nations*" rights from September 1961 through December 1975, Arkla's *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 to 1975 and well established principles of fundamental American justice, Arkla, as determined by the Louisiana supreme court below, is unquestionably "estopped" from legally relying upon and unjustly taking advantage of its *own* continued breach and violation of respondents' legal and contractual rights for 14 years and its *own* uncooperative and effective withholding of all of the true facts concerning its continued breach of contract for 14 years from respondents from 1961 to 1975 in order to unilaterally escape and evade its *own* separate and independent corporate obligation to respond in compensatory damages out of its *own* abundant corporate assets and profits for all of the actual losses and damages that it wrongfully caused respondents to sustain and incur with respect to their dry and residue gas from September 1961 to September 1972. Under basic principles of "*estoppel*" and fundamental justice, Arkla, the defaulting wrongdoer in this breach of contract case that uncooperatively and effectively rendered it absolutely *impossible* for respondents to timely prepare and file routine notices setting forth their "*contractual entitlement*" to 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas with the F.P.C.

pursuant to section 4(d) of the Natural Gas Act from September 1961 to September 1972, is unquestionably "*estopped*" from unilaterally evading and escaping its *own* separate and independent contractual obligation to bear the legal and financial responsibility for all of respondents' actual losses and damages incurred with respect to their dry and residue gas from 1961 to 1972 out of its *own* abundant private corporate assets and profits.

In consistently applying and enforcing fundamental principles of "*estoppel*" against other defaulting contractual obligors that have wrongfully caused injuries and damages by breaching and violating private contractual agreements, this Court has heretofore repeatedly held that:

A. *United States v. Peck*, 102 U.S. 64 (1880):

> "[T]he conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance ... It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned."

B. *Story Parchment Co. v. Paterson P. Paper Co.*, 282 U.S. 555 (1931):

> "As the supreme court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. Allison v. Chandler, 11 Mich. 542, 550-556. . .
>
> > '... And the adoption of any arbitrary rule in such a case, which will relieve the wrongdoer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.'
>
> ... [i]t would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

C. *R. H. Stearns Co. v. United States*, 291 U.S. 54 (1934):

> "The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect "this

is your own act, and therefore you are not damnified." ' Dolan v. Rodgers, 149 N.Y. 489, 491; 44 N.E. 167; and Imperator Realty Co. v. Tull, 228 N.Y. 447, 457; 127 N.E. 263; quoting West v. Blakeway, 2 Man. & G. 828, 839. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong."

D. *Dietrick v. Greaney*, 309 U.S. 190 (1940):

"It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. See United States v. Dunn, 268 US 121, 133, 69 L.Ed 876, 882, 45 S.Ct. 451; Independent Coal & Coke Co. v. United States, 274 US 640, 648 71 L ed 1270, 1278, 47 S Ct. 714."

E. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946):

"Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See Package Closure Corp. v. Sealright Co. (CCA 2d) 141 F2d 972, 979. That principle is an ancient one, Amory v. Delamirie, 1 Strange 505, 93 Eng. Reprint 664, and is not restricted to proof of damage in antitrust suits..."[35]

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[35]See, also: Ballard v. El Dorado Tire Co., 512 F.2d 901 (5th Cir. 1975); Ammerman v. Miller, 488 F.2d 1285 (D.C. Cir. 1973); Perrin v. Rodriguez, 153 So. 555 (La. 1934); Whitfield Cons. Co., Inc. v.

Contrary to Arkla's obviously erroneous and self-serving contentions in this proceeding with respect to the applicable principles of *"estoppel"*, these same basic principles of fundamental justice have heretofore been properly and consistently applied by other courts, like the Louisiana supreme court below in this case, in order to effectuate *basic justice* in other cases involving similar breaches and violations of private gas sales contracts covering the sale of residue natural gas in interstate commerce. See: *Gulf Oil Corp. v. American-Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); and *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976).

Certainly, in light of basic principles of *"estoppel"* and fundamental justice, Arkla's continued breach of contract for 14 years and Arkla's uncooperative and effective withholding of all of the true facts concerning its continued breach of contract from respondents from September 1961 to December 1975 constitutes *"a valid legal excuse"* for respondents' inability to timely prepare and file routine section 4(d) notices with the F.P.C. from 1961 to 1972 setting forth their *"severable"* and *"contractually authorized"* prices of 11.7432¢ to 14.0508¢ per

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Commercial Devel. Corp., 392 F.Supp. 982 (1975); Watson Bros. Transportation Co. v. Jaffa, 143 F.2d 340 (8th Cir. 1944); Gridiron Steel v. Jones & Laughlin Steel Corp., 361 F.2d 791 (6th Cir. 1966); George W. Garig Transfer v. Harris, 75 So.2d 27 (La.S.Ct. 1954); Cox v. Department of Highways, 209 So.2d 9 (La.S.Ct. 1968); Articles 1901, 1903, 1930, 1931 and 2040 of the Louisiana Civil Code; C.J.S., 17A, Contracts, §328, pp. 284-287, and Notes 40.5 and 41; C.J.S., 17A Contracts, §468(a) and (b), pp. 645-647; C.J.S., 17A, Contracts, §469, p.647; Restatement of Contracts, §302 (1932); Restatement of the Law of Contracts, §329; 3A Corbin on Contracts, §748 (1960); 3 Corbin, Contracts, §568, pp. 331-334 (1960); Corbin on Contracts, §§1029 and 1088; 5 Williston, Contracts, §§670, 677 (3rd ed. 1961); 11 Williston on Contracts, §§1296, 1316 (3d ed. 1968); 3 Williston on 'Sales', §599, p.293; and Summers, The Law of Oil & Gas, §§434 and 435.

Mcf for their dry and residue gas, which *"severable"* and *"contractually authorized"* prices were based upon the same *"severable prices"* that Arkla paid to the United States government for the government's dry and residue gas produced from the same Sligo Gas Field from 1961 to 1972 and were well *below* the F.P.C.'s established and approved *"maximum, lawful, just and reasonable area rate ceilings"* for the 1961 to 1972 period. Clearly, our laws and our American System of Justice still function to protect innocent and injured citizens from losses and damages caused by the wrongful acts and omissions of their uncooperative and defaulting contractual obligors.

4.

As heretofore consistently and correctly confirmed by the F.P.C., the Louisiana supreme court, the F.E.R.C.'s staff counsel and the F.E.R.C. itself, this private breach of contract case involves Arkla's separate and independent corporate obligation to respond in compensatory damages out of Arkla's *own* private corporate assets and profits for losses and damages caused by Arkla's continued breach and violation of respondents' private legal and contractual rights for 14 years; just as the Kerr-McGee Corporation, Cities Service Gas Company and the Louisiana-Nevada Transit Company had to ultimately honor their separate and independent corporate obligation to respond in compensatory damages out of their private corporate assets and profits for losses and damages caused by their uncooperative breaches and violations of private legal and contractual rights under similar private gas supply agreements. See: *Eastern Petroleum Co., et al v. Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and certiorari *denied*, 409 U.S. 1052 (1972); *Cities Service Gas Co. v. F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); and *Louisiana-Nevada Transit Co. v. Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

As heretofore consistently and correctly confirmed by the

F.P.C., the Louisiana supreme court, the F.E.R.C's staff counsel and the F.E.R.C. itself in connection with this private breach of contract case, this case does *not* present or involve any question concerning the Commission's substantive regulatory responsibility to protect consumers against "*excessive,*" "*unjust*" or "*unreasonable*" prices for dry and residue natural gas sold in interstate commerce. From 1961 through 1975, the F.P.C. adopted, approved and established "*maximum, lawful, just and reasonable area rate ceilings*" for the sale of dry and residue natural gas as produced from North Louisiana and sold ir interstate commerce in order to fully protect consumers from "*excessive, unjust and unreasonable prices*" for dry and residue gas sold in interstate commerce.[36] In the proceedings that led to the F.P.C.'s adoption and establishment of these "*maximum, lawful, just and reasonable area rate ceilings*", the F.P.C. fully considered all factors affecting "*the relevant public interest*" against "*excessive prices*" for dry and residue natural gas sold in interstate commerce.[37] The appropriateness of the determinations of the F.P.C. in this regard has *never* been an issue in this private breach of contract case.

The "*maximum, lawful, just and reasonable area rate ceiling*" established by the F.P.C. in 1961 was 14¢ per Mcf at 15.025 p.s.i.a. (24 F.P.C. 818). This "*maximum, lawful, just and reasonable area rate ceiling*" was superceded by the F.P.C.'s "*Other Southwest Area Rate Order Nos. 607 and 607-A*" (18 C.F.R. §§154.109 and 154.109a), which, as confirmed at respondents' request by the F.P.C. on November 8, 1976 in connection with this private breach of contract case (Ex. D-59, J.A. 183), established the following "*maximum, lawful, just and reasonable area rate ceilings*" for the sale of

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[36]See: "*Statement of General Policy 61-1*", 24 F.P.C. 818 and "*Other Southwest Area Rate Order Nos. 607 and 607-A*", 18 C.F.R. §§154.109 and 154.109a.

[37]See: *Other Southwest Area Rate Case* (OSWA I), 484 F.2d 469 (5th Cir. 1973).

dry and residue natural gas in interstate commerce as produced from North Louisiana:

Prior to January 1, 1965	From Jan. 1, 1965 thru Sept. 30, 1968	From October 1, 1968 thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

Based upon the *"severable prices"* that Arkla paid to the United States government for the government's dry and residue gas from 1961 to 1972 (see Ex. P-82, J.A. 146), the courts below consistently concluded that respondents were *"contractually entitled"* to receive and should have received the following *"contractually authorized"* prices for their dry and residue gas from 1961 to 1972:

Sept. 1961 through Dec. 1961	Jan. 1962 through Dec. 1966	From Jan. 1, 1967
11.7432¢ per Mcf	13.0252¢ per Mcf	14.0508¢ per Mcf

Had Arkla timely and cooperatively informed respondents of the actual prices that Arkla was in fact paying to the United States government for the government's dry and residue natural gas as produced from the same Sligo Gas Field from 1961 to 1972, i.e. 11.7432¢ to 14.0508¢ per Mcf, and had Arkla timely and cooperatively assisted respondents in preparing and filing the routine section 4(d) notices setting forth their "contractually authorized" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas with the F.P.C. from 1961 to 1972, as Arkla was legally and contractually obliged to do,[38] these are the F.P.C.'s *"maximum, lawful, just and reasonable area rate ceilings"* that *"would"* have governed the *"severable prices"* respondents were *"contractually entitled"* to receive for their dry and residue gas under the private 1952 *"favored nations"* contract with Arkla from 1961 to 1972.

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[38]See: Articles 1901, 1903, 1930, 1931 and 2040 of the Louisiana Civil Code. See, also Arkla's own *"Internal Memorandums"*, Ex. P-176, J.A. 152 and Ex. P-177, J.A. 153.

In connection with this private breach of contract case, the point that respondents' "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 were well *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*" has heretofore been consistently recognized and correctly confirmed by the F.P.C.,[39] the Louisiana supreme court,[40] the F.E.R.C.'s staff counsel and the F.E.R.C. itself.[41]

After the F.P.C. issued its clarification "*Order*" dated November 8, 1976 (Ex. D-59, J.A. 183), and again deferred the resolution and adjudication of this private breach of contract case to the Louisiana courts, the F.E.R.C.'s staff counsel in a "Memorandum Brief" dated August 23, 1978 correctly concluded and confirmed that:

> "Only contracts executed prior to April 3, 1961 may contain favored nations clauses. Therefore, contracts involving jurisdictional sellers which contain these clauses will become relatively infrequent.
>
> Concern that a court might order Arkla to pay excessive rates in the guise of contract damages is not warranted under the circumstances of this case. Even if respondents are entitled to a rate increase, the applicable ceiling rates under the Commission's regulations will impose a limitation on the damages respondents may receive from a court ...

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[39]See: *Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Power Commission, "*Orders*" issued on March 8, 1976, November 8, 1976 and January 7, 1977, respectively, J.A. 177, 183 & 188.

[40]See: *Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 368 So.d 984 (La.S.Ct. 1979), J.A. 51.

[41]See: *Arkansas Louisiana Gas Company v. Frank J. Hall, et al*, Docket No. RI 76-28, Federal Energy Regulatory Commission, "*Orders*" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively, Appendices A, B & C to this brief.

Therefore, the issue in this case is limited to the damages respondents may receive up to these ceiling rates; the question whether such damages would constitute an unreasonable and unjust rate, which would be in the exclusive jurisdiction of the Commission, Montana-Dakota Utilities v. Northwestern Public Service Co., 341 U.S. 246 (1951), is not present. Therefore, the Commission's regulatory responsibility to protect consumers from excessive rates is not involved."

The Louisiana supreme court on March 5, 1979 consistently confirmed that:

> "We note, at the outset, that this controversy involves plaintiff's claims for damages arising from defendant's breach of a gas purchase contract. The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are founded upon a private contract deriving its force and effect from state law. There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues ...
>
> It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of the contract is to be measured by the different between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion). . .
>
> At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and if proper filing procedures had been followed (D-59). The Commission clearly indicated in its order that it would have approved such rates ...
>
> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission." See: J.A. 51.

After the Louisiana supreme court rendered its judgment of March 5, 1979 and denied Arkla's petition for rehearing on

April 9, 1979, the F.E.R.C. in order to perform its section 4(d) "*review function*" with respect to respondents' recovery of compensatory damages measured in part by their "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 issued an "Order" on April 25, 1979 (see Appendix A to this brief). By means of its "*Order*" dated April 25, 1979, the F.E.R.C. obtained from respondents and Arkla all of the pleadings, evidence and summaries necessary for its performance of its section 4(d) "*review function*".

On May 18, 1979, the F.E.R.C. issued an "*Order*" (Appendix B to this brief) correctly setting forth the results of its performance of its section 4(d) "*review function*", to wit:

> "The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract ...
>
> On April 25, 1979, we issued an 'Order Requesting Additional Information to Supplement Record.' Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons ...
>
> The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate ...
>
> ... [W]e find that the rates requested are within what the Commission has determined to be the zone of reasonableness ...
>
> On the facts of this case, the damages do not exceed applicable area ceiling rates. The Louisiana Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group. In so doing, it noted that it

considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed.

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction."

See: Appendix B to this brief.

In light of the Commission's *"Orders"* of November 8, 1976, April 25, 1979 and May 18, 1979, respectively, and the F.E.R.C.'s review of all of the judgments rendered by the Louisiana courts below (including a review of the pleadings and evidence contained in the record of the private breach of contract case), the F.E.R.C. and the United States, in their "Amici Curiae Brief" as filed with this Court in Docket No. 78-986 on June 3, 1979 at pp. 15 and 16, correctly and consistently confirmed that:

"The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures (*United States v. Radio Corporation of America*, *supra*, 358 U.S. at 348), no such issues were presented.

Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act ...

Since the measure of damages claimed turned on lease payments to the United States which did not exceed Com-

mission applicable area ceilings (App., *infra*, 15a,), there was no question concerning the reasonableness of the rates for the Commission to consider."

Consistent with the prior and correct determinations of the F.P.C., the Louisiana supreme court and the F.E.R.C. with respect to the quantum of compensatory damages issue in this breach of contract case, the Louisiana state court of appeal on January 22, 1980[42] reconfirmed that:

> "On the basic contract question (to use terminology frequently used by FERC) the effect of the lower court's finding, which we again approve, is that the contract shall be interpreted to entitle these plaintiffs to damages measured by what Arkla paid the United States for its gas and for LHC products severed from its gas ...
>
> The Supreme Court of Louisiana agreed and FERC so understood.
>
> > 'The Louisiana courts found that the contract provided for a price for the [LHC] products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.'
> >
> > Footnote 19, FERC, May 18, 1979, cited supra in Footnote 5."
>
> See: J.A. 72.

Again, on the basis of the Commission's "*Orders*" dated November 8, 1976, April 25, 1979, May 18, 1979 and July 16, 1979, and the Louisiana supreme court's judgment of March 5, 1979, the F.E.R.C. on November 5, 1980 again consistently confirmed that:

> "The rates (11.7432 cents per Mcf to 14.0508 cents per Mcf) would, however, be within the Commission ceilings in effect during that time ...

[42]*Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 379 So.2d 1142 (La.App.2d 1980), J.A. 72.

> We recognize the determination of the Louisiana courts that the Hall group did not file for a rate increase in 1961 because Arkla withheld from the Hall group information that the Louisiana courts found Arkla was required to give the Hall group, and we realize that as between the Hall group and Arkla, the equities are favorable to the Hall group."[43]

In light of the consistent and definitive determinations of the F.P.C., the Louisiana state district court, the Louisiana state court of appeal, the Louisiana supreme court, the F.E.R.C.'s staff counsel, and the F.E.R.C. itself in connection with the quantum of compensatory damages issue in the instant private breach of contract case, it has been conclusively established that respondents' "*severable*" and "*contractually authorized*" prices of 11.7432¢ to 14.0508¢ per Mcf for their dry and residue gas from 1961 to 1972 were always well *below* the F.P.C.'s established and approved "*maximum, lawful, just and reasonable area rate ceilings*" for the sale of dry and residue gas produced from North Louisiana and sold in interstate commerce from 1961 to 1972. Therefore, it is clear beyond dispute that the quantum of compensatory damages issue in this private breach of contract case does *not* in any way involve a question concerning the Commission's regulatory responsibility to protect consumers from "*excessive*," "*unjust*" or "*unreasonable*" rates for dry and residue gas sold in interstate commerce from 1961 to 1972.

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[43]See the discussion as set forth in footnote 22 on page 23 of this brief.

V.

CONCLUSION

Respondents respectfully submit that in the interest of basic and fundamental justice with respect to all of the actual losses and damages that Arkla wrongfully caused them to sustain and incur from September 1961 through December 1975, the judgment of the Louisiana supreme court below dated March 5, 1979 should be *affirmed.*

Moreover, respondents respectfully submit that this Court in *affirming* the judgment of the Louisiana supreme court below should once again remind Arkla that it, like all other contractual obligors, *must* timely honor and cooperatively fulfill its private contractual agreements *or* in default thereof be prepared to separately and independently respond in compensatory damages out of its *own* abundant private corporate assets and profits for all losses and damages occasioned by its breach and violation of its private contractual agreements.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

April 1, 1981

APPENDIX

APPENDIX TO
RESPONDENTS' BRIEF ON THE MERITS

Contents: **Page**

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Don S. Smith, Georgiana Sheldon,
Matthew Holden, Jr., and
George R. Hall.

Arkansas Louisiana Gas Company	)	
	)	Docket
v.	)	No. RI76-28
	)	
Frank J. Hall, *et al.*	)	

ORDER REQUESTING ADDITIONAL INFORMATION TO SUPPLEMENT RECORD

(Issued April 25, 1979)

To aid it in its determination of the jurisdictional questions in this case this Commission needs some additional information.

The Supreme Court of Louisiana stated in an opinion in a parallel case[1] that:

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

The trial court in Louisiana stated.[2]

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[1]*Frank J. Hall, et al.* v. *Arkansas-Louisiana Gas Company*, No. 62,560, March 5, 1979, p. 12, n. 7.

[2]*Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court Caddo County, Louisiana; No. 225,699, October 14, 1977.

The evidence demonstrates that the price paid to the United States per Mcf of gas was below the maximum area rate ...

This Commission is interested in the basis on which the Louisiana Courts awarded damages for gas. We want to know at what price per Mcf of gas the courts awarded damages to the Hall plaintiffs. We also want to know what damages were demanded by the plaintiffs in the Louisiana courts.

The Commission therefore orders:

(A) Hall *et al.* to file with this Commission within ten days:

(1) A copy of the complaint filed in the Louisiana proceedings, including all amendments to that complaint;

(B) The parties to these proceedings to file with the Commission within ten days:

(1) A summary of the damages awarded by the Louisiana Courts. The summary shall show what price per Mcf of gas the Louisiana Courts decided that the Hall plaintiffs were entitled to broken down by time periods. We are specifically interested in damages for the gas as opposed to damages awarded for any extracted liquids. A party may wish to provide a breakdown of the total damages showing the damages per Mcf for the gas, and the damages per Mcf for the liquids. But each party must show the damages per Mcf for the gas for every time period. We also stress that we want a summary showing what the Louisiana courts actually did rather than any attempt to relitigate the damages determined by the Louisiana Court. In its summary each party shall explain the evidentiary basis of its summary and shall include copies of the evidence it believes was actually used by the courts in determining damages; and

(2) The parties should at the time of filing the data with this Commission serve each other with copies of this data. If the summaries of evidence do not agree the

parties are directed to file comments on any disagreements within 5 days.

By the Commission. Commissioner Smith voted present.

(S E A L)

Kenneth F. Plumb,
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PRIMARY JURISDICTION

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Matthew Holden, Jr., and George R. Hall.

Arkansas Louisiana Gas Company	)	
	)	Docket
v.	)	No. RI76-28
	)	
Frank F. Hall, *et al.*	)	

ORDER DECLINING JURISDICTION AFTER RECONSIDERATION OF THE ISSUE ON REMAND

(Issued May 18, 1979)

I

A QUESTION OF JURISDICTION

In this case this Commission[1] is faced with a question of jurisdiction. Should this Commission exercise jurisdiction to the exclusion of state courts to determine whether a royalty agreement between a gas utility and the United States is a "purchase [of gas] from another party-seller" that triggers an automatic price increase under the "most favored nation

[1]These proceedings were commenced before the FPC. By joint regulation of October 1, 1977 (10 CFR 1000.1), they were transferred to the FERC. The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the FPC, when used otherwise, to the FERC.

clause" in a gas supply contract between the utility and certain independent producers of gas?[2]

II

HISTORY OF PROCEEDINGS

A. The Parties

Frank J. Hall, *et al.* are a group of independent producers of natural gas. Under a 1952 contract with the Arkansas-Louisiana Gas Company ("Arkla"), if Arkla purchases gas from any other producer in the same gas field at a higher price for gas than it pays the Hall group under the contract, Arkla must pay the Hall group that higher price. This contractural provision, known as a most favored nation clause, provides:

> If at any time during the term of this agreement buyer should purchase from another party-seller gas produced from the subject wells or any other well or wells located in the Sligo gas field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract.

B. The State Court Proceedings

In 1974, the Hall group sued Arkla for breach of contract in a Louisiana State court[3] claiming that royalty payments made to the United States by Arkla since 1961 under a gas supply arrangement with the government had triggered the most

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[2]*Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief, August 9, 1978. This is not the first time we are facing this case. The FPC first addressed the jurisdiction question in an order dated March 8, 1976. The FPC's previous actions in this case are discussed more fully in Section II, *infra*, pp. 4-5.

[3]*Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo County, Louisiana, No. 225,699.

favored nation clause. The Hall group claimed that they were entitled to damages retroactive to 1961.

In October 1977, the state court found for the Hall group and awarded substantial damages.

On appeal, the Court of Appeals of Louisiana. Second Circuit,[4] held that: (1) The trial court had proper subject matter jurisdiction. Jurisdiction was not exclusive in the FERC under the Natural Gas Act. And the FERC does not have primary jurisdiction to determine whether the favored nation clause was activated by the royalty payment to the United States. (2) The favored nation clause was activated by the royalty payment because the royalty payment was tantamount to a "purchase from another party seller."[5] The court remanded the case to the trial court for recalculation of damages. Arkla petitioned the Supreme Court of Louisiana for certiorari. The Supreme Court of Louisiana denied the petition.[6] Arkla has petitioned the Supreme Court of the United States for certiorari.

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[4]*Hall* v. *Arkansas-Louisiana Gas Company.* 359 So.2d 255 (May 1, 1978).

[5]The Court so found despite its recognition that the theory of ownership advanced by Arkla was:

> ... in accord with the prevailing state law and federal decisions on this issue. See *Shell Petroleum Corp.* v. *Calcasieu Real Estate & O. Co.*, 185 La. 751, 170 So. 785 (1936); *Logan* v. *State Gravel Co.*, 158 La. 105, 103 So. 526 (1925); *Board of Com'rs. of Caddo Levee Dist.* v. *Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929); *Melancon* v. *Texas Company*, 230 La. 593, 89 So.2d 135 (1956). *Mobil Oil Corporaton* v. *Federal Power Commission*, 149 U.S. App. D.C. 310, 463 F.2d 256 (1971), *cert. den.* 406 U.S. 976, 92 S.Ct. 2413, 32L.Ed.2d 676 (1972).

The Court concluded that the intentions of the parties were not to limit the activation of the favored nation clause only to situations where there was a technical "purchase," "seller," or "price." The Court decided that royalty payments were within the intentions of the parties when they drafted the favored nation clause.

[6]A related petition for certiorari was also filed by the Hall group. The Hall group petition was granted for the limited purpose of con-

C. Action Before the FPC

After the Hall group first filed suit in state court, Arkla applied to the FPC for a declaratory order construing the favored nation clause contained in its contract with the Hall group.

Before the FPC, Arkla argued that the FPC had exclusive jurisdiction over the dispute. The FPC[7] held:

> There is no question that sales of natural gas by [the Hall group] to Arkla are subject to the jurisdiction of the Commission.
>
> * * *
>
> However, there is a threshold question as to the contractual basis of [the] rates. It has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court ***. This case presents a question of concurrent jurisdiction *** While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the Court to decide these contract questions.

On Arkla's application for rehearing, the FPC ruled[8] that even if the state court held that the Hall group was entitled to a higher rate under the favored nation clause, they, as jurisdictional sellers, would still be limited to ceiling rates in effect under the Commission's regulations. The FPC also noted that

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sidering the level of damages and whether one member of the group had waived his right to damages. The Louisiana Supreme Court on March 5, 1979, issued its decision on those matters. It has awarded damages for the period 1961 to 1972 which the Court of Appeals had rejected.

[7] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Petition (March 8, 1976).

[8] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Denying Application for Rehearing (issued June 4, 1976). In these proceedings, the FPC issued other orders which are not relevant at this time.

since the producers held a small producer certificate effective October 19, 1972, they were not required to make any rate increase filings thereafter.

On February 3, 1977, Arkla petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the FPC's orders.

D. Actions By The FERC

On March 21, 1978, the FERC moved in the U.S. Court of Appeals for an order remanding the record in these proceedings to the FERC for further consideration.

On May 25, 1978, the Court of Appeals granted the Commission's motion and remanded the record to the Commission.

On August 9, 1978,[9] the Commission asked for briefs directed towards the question of

> "whether this Commission has primary jurisdiction over these matters, and if so, whether this Commission should exercise such jurisdiction in the circumstances presented here."

The Commission noted that the briefs should not discuss the merits of the case but should limit the discussion to the jurisdictional issues.

IV.

DISCUSSION

As noted above, the FPC declined to issue a declaratory order construing the most favored nation clause in the Arkla-Hall contract. It held that there was concurrent jurisdiction with the state court and that it would defer to that court.

The FPC stated that there is a "[c]ommission policy to defer

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[9] *Arkansas-Louisiana Gas Company* v. *Frank J. Hall, et al.*, Docket No. RI76-28, Order Setting Matter for Determination on Brief.

action on contract questions presented to it involving jurisdictional sales which are pending in state court."[10]

While we concur in the result reached by the FPC, we do not subscribe to its rationale. Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission. We believe the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous.

In examining whether this Commission has a special expertise which makes it the appropriate forum to decide whether the Arkla-Hall favored nation clause has been triggered, we note initially that the Commission is, in general, no more expert than a court in deciding non-technical contact questions. However, interpretation of some types of contractual clauses may involve examination of technical issues which are within this Commission's special expertise. Determination of the dispute between Arkla and the Hall group depends upon finding that Arkla has "purchase[d] from another party-seller gas produced from the subject wells or any other wells located in the Sligo gas field at a higher price than is provided to be paid for gas delivered under this agreement." While there are circumstances where the interpretation of a favored nation clause may involve this Commission's technical expertise,[11] we

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[10]Order Denying Petition (March 8, 1976) p. 3.

[11] See *Pure Oil Company* v. *F.P.C.*, 299 F.2d 370 (7th Cir., 1962). In that case the interpretation of a favored nation clause involved the issue of whether certain purchased gas possessed exceptional qualities for peaking purposes which enhanced its value to the extent that a seemingly triggering price was not higher on a comparative basis than the prices paid under the contract.

have been presented with no issue in this case involving our special expertise. Arkla makes no argument in this case that would involve our technical expertise. Arkla's defense to the contract action is that the royalty agreement between itself and the United States is not a "purchase from another party-seller" which triggered the favored nation clause. The outcome of the case appears to turn on interpretation of the intent of the parties to the contract rather than any determination requiring special technical expertise. We therefore see no reason to exercise our jurisdiction based upon a finding that the case involves a matter within our special expertise.

We next consider whether this case is one in which there is an issue which requires uniform interpretation. We consider the need for uniformity in light of the policies Congress has charged this Commission to administer. In this regard we must consider that transactions subject to the Natural Gas Act rest in large part on private contracts and that the Commission's role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act.[12] While this "Commission has plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interests,"[13] and to this end in appropriate cases, might find that achievement of the purposes of the Natural Gas Act requires that certain terms in contracts should be uniformly interpreted, we do not believe this to be such a case.

In this case this Commission is being asked to interpret a favored nation clause. The dispute is whether under the contract a royalty agreement is a "purchase [of gas] from another party-seller" that triggers an automatic price increase under the favored nation clause. In the circumstances of this case

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[12]See *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 343-344 (1956); *United Gas Co.* v. *Memphis Gas Div.*, 358 U.S. 103, 109-110, 112-114 (1958).

[13]*Permian Basis Area Rate Cases*, 390 U.S. 747, 784 (1968).

whether a "purchase" occurred within the meaning of the contract depends upon what type of transactions the parties to the contract intended "purchase" to include.[14] What "purchase from another party-seller" means in one gas supply contract does not necessarily mean the same thing in another gas supply contract. The makers of one contract may have intended the favored nation clause to be triggered by events other than those intended to trigger the clause in another contract. Since the meaning of a favored nation clause depends upon the intentions of the parties to the contract, we see no need for uniform interpretation of all favored nation clauses. Indeed, uniform interpretation would seem to be impossible.

It has been argued that the interpretation of this contract may have involved a state court in determining whether a "sale" had occurred. And the interpretation of the word "sale", it was argued, would involve a state court in the interpretation of an important term defining this Commission's jurisdiction over gas.[15] But this case does not involve determining jurisdiction over gas. We undisputedly have jurisdiction over the gas involved in this case. This case involves contract interpretation. And it is clear that the word "sale" may have a different meaning in a contract than it does under that section of the Natural Gas Act conferring jurisdiction upon this Commission. "The same words, in different settings, may not mean the same thing."[16]

Finally, in considering the need for uniformity, we look at the fact that the contracts between Arkla and the Hall group

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[14]The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract. See n. 2, p. 3

[15]This Commission's jurisdiction extends to "the *sale* of natural gas in interstate commerce for resale." Section 1(b) of the Natural Gas Act, 52 Stat. 821 15 U.S.C. 717(b).

[16]*Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950).

were entered into long before this Commission became actively concerned with the indefinite price escalation clauses, and more particularly with favored nation clauses. The contract in question was entered into in 1952. Not until 1961 did the FPC issue regulations concerning most favored nation clauses.[17] Indeed, in contracts executed after April 3, 1961, most favored nationl clauses are prohibited. Since these contracts were entered into before the FPC issued regulations concerning favored nation clauses, the makers had no guidance from the Commission in drafting the clauses. Since at the time, no Commission policy existed requiring uniformity, the meaning of the clauses was left to the intentions of the parties. Ascertainment of such intentions is a matter of case-by-case adjudication that does not invoke the considerations of uniformity or technical expertise that would, in other circumstances, support assertion of this Commission's primary jurisdiction.

Finally, we must decide now what impact this case has on our regulatory responsibilities. This type of case, involving small producers not required by regulation under the Natural Gas Act to file for rate increases authorized by contract,[18] is not a matter of great import to our regulatory responsibility as we find no need for a uniform interpretation of a contractual provision, and find that the rates requested are within what the Commission has determined to be the zone of reasonableness.

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[17] 18 C.F.R. 154.93.

[18] The Hall Group holds small producer certificates which exempt it from certain rate filing requirements. See 18 C.F.R. 157.40. But for this status, the group would have been required, under the filed rate doctrine, to apply for and receive approval of any change in its rates on file with this Commission before it could collect any price increase claimed to have been triggered under the favored-nation clause. *Montana Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). Moreover, whether the group held small or large producer status, such increases could have been recovered only prospectively. *Id.* However, because a small pro-

On the facts of this case, the damages do not exceed applicable area ceiling rates.[19] The Louisiana Supreme Court

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ducer is exempt from rate filing requirements and could commence collection of contractually authorized rates on demand to the buyer, a court would be capable of finding an award of damages for the difference between a rate permitted by the contract, up to applicable limits provided by the Commission for small producers, and amounts actually collected.

Prior to 1972 the Hall group did not hold small producer certificates. In the "Order Denying Application for Rehearing" issued June 4, 1976, the FPC stated on p. 2, n. 1:

> Prior to the filing of their small producer application, respondents, of course, as ARKLA contends, would be entitled under the Natural Gas Act only to the rate on file with this Commission and in effect. See *Samedan Oil Corp., et al.*, 37 FPC 207, and cases cited therein.

The FPC held that the producers were not entitled to a rate increase for the period prior to when they held small producer certificates since they had not filed for a rate increase as required by Commission regulation. The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. The Louisiana Court therefore deemed that the Hall group had fullfilled its obligation to file new rate schedules. On this basis the Louisiana Supreme Court awarded damages for the 1961 to 1972 period after the favored nation clause was found to have been triggered and before the Hall group received small producer certificates.

It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a write of *certiorari* has been filed in the Supreme Court of the United States seeking review of the Louisiana Supreme Court's decision *Arkla* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978.

[19]On April 25, 1979, we issued an "Order requesting Additional Information to Supplement Record." Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed the applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this

concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group.[20] In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed.[21] The Supreme court of Louisiana further stated:

Commission's November 8, 1976, "Order Clarifying and Amplifying Commission Order Denying Rehearing" we stated:

> While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.

[20]As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that the Hall group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine.

[21]*Frank J. Hall* v. *Arkansas Louisiana Gas Company*, Supreme Court of Louisiana (March 5, 1979), slip op. p. 11. The Commission's previous orders were its *Order Denying Application For Rehearing*, (June 4, 1976); and *Order Clarifying And Amplifying Commission Order Denying Application For Rehearing* (November 8, 1976).

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.[22]

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above.

By the Commission

(S E A L)

Kenneth F. Plumb,
Secretary

[22]Supreme Court of Louisiana, slip op. p. 12, n. 7.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon,
Acting Chairman;
Matthew Holden, Jr., and
George R. Hall.

Arkansas Louisiana Gas Company	)	Docket
	)	No. RI76-28
v.	)	
	)	
Frank J. Hall, *et al.*	)	

ORDER DENYING REHEARING

(Issued July 16, 1979)

On May 18, 1979, this Commission issued an "Order Declining Jurisdiction After Reconsideration of the Issue on Remand." Applications for rehearing and reconsideration of that order have been received from all parties in this proceeding. Those applications are denied.

The Commission has also received an application for waiver of Section 4(d) of the Natural Gas Act. The application for waiver will be dealt with in a separate order. This denial for rehearing does not affect or prejudge the application for waiver.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.